

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: December 3, 2004

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Pacific Theatres 512-5060-7550
Case 31-CA-26905

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by permitting an employee who works at one of its theatres access to break rooms at all its 23 theatre locations to gather signatures for a decertification petition.

We conclude that the Employer did not provide unlawful assistance to the decertification effort given its apparent policy of allowing employees unlimited access to all theatre break rooms; the lack of evidence of any disparate treatment in granting access to break rooms to engage in solicitation; and the absence of any supervisory coercion during the solicitation of signatures for the decertification petition.

FACTS

Pacific Theatres (the Employer), a Southern California movie theatre chain, and the International Alliance of Theatrical Stage Employees (the Union) have a long collective bargaining history. The parties' most recent contract ran from April 1, 1999, to March 31, 2004. This bargaining agreement covered a unit of approximately 1200 employees working in the Employer's 23 theatres.

While on duty, the Employer's employees wear a uniform consisting of black pants and an Employer provided polo shirt; managers wear a different uniform. The Employer maintains a policy that employees are not supposed to wear their uniform shirts when they are not working,¹ and are supposed to cover up the uniform shirts while on break.

The Employer's employee handbook contains a no solicitation/no distribution rule that states:

¹ This policy appears on the Uniform Professionalism sheet that employees must sign acknowledging that they have been provided the company uniform and grooming standards.

Employees are prohibited from soliciting or distributing literature during their working time or when any employee being solicited is on working time. There shall be no solicitation or distribution by employees in areas open to the public nor will distribution be permitted at any time in any working area.

The handbook also contains the following provision related to the use of Employer property:

All company property, including but not limited to: desks, furniture, storage areas, file cabinets, computer systems, including the use of email and the internet, telephones, cellular phones, pagers, modems, copiers, fax machines, vehicles, theater equipment, *buildings* and grounds, etc., are available for business use only and shall not be used for personal use unless in case of emergency with prior authorization from the manager on duty. (Emphasis added.)

The employee handbook does not contain a rule specifically addressing employee use of break rooms. The Employer claims that employees are permitted access to all the break rooms upon request. Break rooms have numeric codes, and any employee knowing the code can access the rooms. Access to the break rooms is not monitored.

In May 2004,² John Gervais, the head projectionist at the Employer's Pacific Grove Stadium 14 theatre, learned at an employee meeting that the Employer and the Union were engaged in negotiations for a successor collective-bargaining agreement. Gervais, unhappy with the Union and believing that there was widespread dissatisfaction with the Union among his coworkers, asked his manager, Matt Eide, if there was a way to oust the Union.

The following week Eide informed Gervais that there were two ways the employees could sever their ties with the Union. The first was to file a decertification petition requiring a showing of interest from 30% of the unit employees; the other was for a majority of the unit employees to disavow the Union. Eide provided Gervais with language for a decertification petition and told him that unit employees needed to sign and date the petition. Eide also informed Gervais that the solicitation of signatures could not be done in the theatres, but only in the break rooms or outside the theatres, that Gervais could not use

² All dates hereafter are in 2004.

any company equipment to solicit signatures, and that only employee members of the Union could sign the petition, not new hires.³

Gervais began gathering signatures for the decertification petition on May 21 at the Pacific Grove Stadium 14 theatre. Gervais worked his scheduled shift that day, clocked out, and then proceeded to the employee break room for 2 - 2½ hours to gather signatures. While in the break room, Gervais remained in his official Pacific Theatres uniform. Gervais testified that the purpose in wearing his uniform was to ease apprehensions of unfamiliar coworkers and let them know that he was an employee. On May 22, Gervais again gathered signatures after completion of his scheduled shift at the Pacific Grove location.

On May 26, Gervais traveled to the Employer's Culver Stadium 12 location, where he had not previously worked. Gervais spoke to one of the employees and was given the code for the keypad-controlled lock on the employee break room. Gervais gathered signatures in the break room for 1 - 1½ hours. Gervais wore his official company shirt during this time. He subsequently visited the Culver Stadium theatre on four or five occasions to gather additional signatures. On at least one occasion, Gervais spoke to that theatre's Manager and General Manager for approximately 30 seconds in the break room. Gervais told them he was there gathering signatures, but did not identify the purpose of the petition. The managers immediately left the break room.

On May 29, Gervais traveled to the Employer's Beach Cities 16 location and told the manager that he wanted access to the employee break room to gather signatures. The manager had another employee escort Gervais to the break room where he was given the keypad code. Gervais was in the break room for 1- 1½ hours and was not wearing his uniform shirt, but did have his employee ID necklace.⁴

³ At some later time, Gervais asked Eide to clarify the Employer's break room policy. Eide stated that any employee had access to any of the employee break rooms at any of the Employer facilities.

⁴ On June 4, Gervais returned to Beach Cities 16 wearing his official uniform shirt and spent 4 hours in the break room gathering signatures. As Gervais left the building, he informed a manager that he had been in the facility gathering signatures without specifying the nature of the petition.

On June 5, Gervais and a fellow employee traveled to the Employer's Sherman Oaks Galleria 16, Winnetka 21, and Northridge Fashion Center 12 locations to gather signatures. At the Galleria 16 theatre, an employee escorted the pair to the break room. At Winnetka 21, Gervais and the fellow employee introduced themselves to a manager and informed her that they were gathering signatures. Gervais and his partner were given the break room keypad code.⁵ At Northridge Fashion Center 12, Gervais spoke with an employee who escorted them to the break room. Gervais and his fellow employee spent about one hour in the break room. During that time, a manager came into the break room upon hearing that there were strangers present. The manager asked Gervais if he was sure that they could be there. Gervais responded that as employees they could be in the break room, and the manager left.

On June 6, Gervais spent 4 hours in the break room of Sherman Oaks Galleria 16 gathering signatures. Gervais believes that he introduced himself to a manager and stated that he was an employee from Pacific Grove 14 gathering signatures.

On June 14, Gervais approached Eide about how he should go about filing the decertification petition. The following day, Eide informed Gervais that he needed to contact the Region and speak to a Board Agent. Gervais immediately contacted Region 31. Gervais learned that he needed a copy of the collective-bargaining contract, which he obtained from Eide.

Gervais testified that he solicited over 200 of the approximately 370 gathered signatures and with the exception of the few gathered outside the theatres, all 200 signatures were gathered while in break rooms of the Employer's theatres. On June 16, he filed a decertification petition in Case 31-RD-1506, which is currently blocked by this charge.

ACTION

We conclude that the Employer did not provide unlawful assistance to the decertification effort given its apparent policy of allowing employees unlimited access to all theatre break rooms; the lack of evidence of any disparate treatment in granting access to break rooms to engage in any type of solicitation; and the fact that there were no other acts of

⁵ On June 13, Gervais returned to Winnetka 21 and informed the manager that he would be spending time in the break room gathering signatures, and did so for 7 to 8 hours.

supervisory coercion during the solicitation of signatures for the decertification petition.⁶

No case specifically addresses whether an employer violates Section 8(a)(1) by providing employees with unlimited access to break rooms to obtain signatures in support of a decertification petition. The Board has held that an employer may not solicit, support, or assist in the initiation, signing, or filing of an employee decertification petition.⁷ Employer involvement is not, however, per se unlawful.⁸ The Board will not find a violation, for example, where the employer's conduct constitutes no more than "mere ministerial aid,"⁹ or where the employer is simply assisting employees in the expression of their predetermined objectives or the realization of an independently arrived at decision.¹⁰

Applying this precedent, the evidence does not support an allegation that the Employer's grant of unlimited access to its break rooms amounted to unlawful assistance. There is no evidence that Gervais' use of the break rooms had a coercive impact on the bargaining unit members' willingness to sign the petition. It is undisputed that Gervais circulated the decertification petition on his own volition

⁶ The Region has determined that the Employer did not violate Section 8(a)(1) by providing Gervais initial assistance concerning how employees could disavow the Union, and by supplying the decertification language for the petition.

⁷ See Placke Toyota, Inc., 215 NLRB 395, 395 (1974) (employer put its imprimatur upon the petition by permitting it to be circulated as a company document on its letterhead and by allowing it to remain for several days on a supervisor's desk); Caterair International, 309 NLRB 869 (1992) enfd. in relevant part and remanded 22 F.3d 1114 (D.C. Cir. 1994) (employer violated 8(a)(1) by allowing managers to circulate decertification petition and solicit employees signatures).

⁸ See Eastern States Optical Co., 275 NLRB 371, 372 (1985) (employer assistance in wording the petition was lawful where "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.").

⁹ Consolidated Rebuilders, Inc., 171 NLRB 1415, 1417 (1968).

¹⁰ See Eastern States Optical Co., 275 NLRB at 373; Washington Street Foundry, 268 NLRB 338, 339 (1983).

and the Employer was not involved in the inception of the petition or the solicitation of signatures in any way. Nor is there any evidence that Employer officials discussed the petition with employees at all or ever observed the decertification solicitations.¹¹ Indeed, several managers who heard a stranger wanted access to or was in the break room immediately left after learning what Gervais was doing.

There also is no evidence that the Employer disparately enforced any of its policies to support the decertification effort. As to Gervais' unlimited access to break rooms, the employer claims it has an open access break room policy. Upon request for clarification by Gervais, Eide explicitly stated that it is the Employer's policy to allow any employee access to any break room. The Employer's actions are entirely consistent with this policy and there is no evidence of any other employee having been denied access to another Pacific Theatre break room. The fact that the Employer maintains a rule limiting employee use of "company property" is not to the contrary since there is no evidence that any employee ever sought or was denied access to a break room pursuant to the rule.¹²

The Union argues that Gervais' wearing of a uniform shirt while soliciting signatures at several theatres, contrary to company policy but permitted by managers, supports finding a violation of Section 8(a)(1). However, under the circumstances of this case, this is not a viable theory of violation. Despite the Employer's written policy that employees are not permitted to wear their uniform off duty, there is no evidence that the Employer has ever enforced this rule.¹³ The Employer admits that it does not monitor whether an employee may be wearing his uniform off duty, and in fact acknowledged that employees likely wear their uniforms off work in a variety of different contexts, such as on public transportation to and from work and doing

¹¹ Compare, Yaohan U.S.A. Corp., 319 NLRB 424 (1995) (supervisors retained decertification petition in their office and invited employees in one by one to receive their blatant antiunion message and urging to sign the petition).

¹² Compare, Walter Garson, Jr. & Assoc., 276 NLRB 1226, 1241-1242 (1985) (no violation absent evidence of disparate treatment; no evidence that employee use of plant telephone and automobile was inconsistent with testimony regarding the past practice of permitting some solicitation and personal business during work hours using company facilities).

¹³ The only evidence of discipline in connection with the Employer's uniform policy was a written citation issued to an employee for wearing inappropriate shoes during work.

errands after completing their scheduled shift. Gervais admitted to often wearing his uniform shirt at theatres where he did not work so that employees would recognize him as a Pacific Theatre employee and would not be fearful in approaching him. Given that the Employer has no history of enforcing this uniform rule, that Gervais wore his uniform shirt during solicitation on his own initiative, and that the employee's uniform differs from that of a manager's uniform, we conclude that the Employer's failure to enforce the uniform policy as to Gervais did not give the appearance of supervisory approval of the decertification petition or constitute disparate treatment. Therefore, the fact that the Employer was aware that Gervais wore his uniform shirt on some occasions while soliciting decertification signatures was not conduct that tainted the petition.

Lastly, contrary to the Union's assertion, the Employer did not violate Section 8(a)(1) by failing to enforce its written no solicitation policy.¹⁴ Gervais solicited signatures either in break rooms, which are non-public, non-working areas, or outside the theatres. Gervais was not on working time while he was soliciting signatures and all the employees he solicited were either on break in the break room or off work outside the theatre. Since Gervais' actions did not violate the no solicitation policy, the Employer's lack of enforcement was appropriate.

For the foregoing reasons, the Region should dismiss the complaint, absent withdrawal.

B.J.K.

¹⁴ The Employer's policy prohibits employees from soliciting or distributing literature during their working time, or when any employee being solicited is on working time, in working areas, or in areas open to the public.